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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PENSKE MEDIA CORPORATION, ) Case No.: CV 11-7560-JST (MRW)  
dba PMC, a Delaware corporation, )

**Plaintiff,**

PROMETHEUS GLOBAL MEDIA, LLC, a Delaware limited liability company d/b/a hollywoodreporter.com; and DOES 1 through 10, inclusive.

## Defendants.

} Hon. Josephine Staton Tucker  
}) Magistrate: Hon. Michael R. Wilner

**DISCOVERY MATTER:  
SUPPLEMENTAL BRIEF IN  
SUPPORT OF MOTION TO COMPEL  
DISCOVERY RESPONSES FROM  
PLAINTIFF PENSKE MEDIA  
CORPORATION**

) Action filed: September 14, 2011  
) Discovery Cut-off: November 9, 2012

Trial Date: July 9, 2013  
Hearing Date: January 17, 2013  
Hearing Time: 9:30 A.M.  
Hearing Location: Courtroom H

Prometheus Global Media LLC (“Prometheus”) hereby submits its supplemental brief in support of its motion to compel discovery responses from Plaintiff Penske Media Corporation (“Penske”), and in opposition to Penske’s motion to compel.

## 5 | I. Prometheus's Motion to Compel

6           A. ***Identification and Information Regarding the Allegedly Copied***  
7            ***Code***

8 Penske has now agreed to produce the requested documents regarding the  
9 computer code that is the subject of its copyright infringement claim. Defendant  
10 Prometheus Global Media, LLC's Notice of Motion and Joint Stipulation  
11 ("Prometheus's Motion"), at 17. The agreement is subject to entry of a protective  
12 order. For the avoidance of doubt and to confirm Penske's obligation, Prometheus  
13 requests that the Court (a) enter an order obligating Penske to produce the  
14 documents requested in Prometheus's requests for production Nos. 1-3 and (b)  
15 enter the proposed protective order filed herewith by Prometheus.

16 The Court should compel Penske to answer Prometheus’s Interrogatories  
17 Nos. 1 and 2, as to which Penske continues to object on the meritless basis that the  
18 interrogatories ask for expert testimony. The interrogatories address the issue of  
19 why and how Penske opted to modify its own computer code seven times. By  
20 definition, those are facts in Penske’s own possession and not something for which  
21 Penske must turn to an expert. The nature and reasons for the modifications are  
22 potentially highly material to the case, in particular to whether Penske has a valid  
23 copyright and, if it does, whether it has any claim for statutory damages under the  
24 Copyright Act. Prometheus is entitled to know why and how the code was  
25 modified.

With respect to Prometheus's Interrogatory No. 1, the Court also should compel Penske to provide an answer as to how the first version of its code differs from the open source code on which it is based. Penske's claim that its "intent" is

1 irrelevant is meritless as a justification for refusing to answer. Penske's copyright  
 2 registration states that Penske is not claiming copyright protection over portions of  
 3 the submitted code. It is fundamental in a copyright infringement action that a  
 4 defendant is entitled to know what plaintiff does and does not claim copyright  
 5 protection for. Penske should be compelled to state exactly which parts of its own  
 6 registered work it claims are original and which parts it concedes are open source.

7                   **B.     *Production of Documents Relevant to Penske's Alleged Damages***

8                   With respect to Issue #2 in Prometheus's Notice of Motion, relating to  
 9 Prometheus's request for documents relevant to Penske's damages, Penske no  
 10 longer disputes that Prometheus's request was entirely proper and has now agreed  
 11 to produce documents pursuant to a protective order. *See* Prometheus's Notice of  
 12 Motion, at 20-21. For the avoidance of doubt and to confirm Penske's obligation,  
 13 the court should enter an order compelling Penske's production of documents in  
 14 response to Prometheus's RFP No. 4, in addition to entering the aforementioned  
 15 protective order.

16                   **II.    Penske's Motion to Compel**

17                   With respect to Penske's motion, the only issue in need of supplemental  
 18 briefing is "Issue #6, Gross Revenues and Expenses from Website and homepage,  
 19 for three weeks that carousel was up (requests for Production 56-59)." *See*  
 20 Plaintiff Penske Media Corporation's Notice of Motion and Joint Stipulation  
 21 ("Penske's Notice of Motion"), at 28. The Court should deny Penske's motion and  
 22 order that these documents need not be produced, because they are unrelated to any  
 23 conceivable recovery of damages available to Penske. *See Ocean Atlantic*  
 24 *Woodland Corp. v. D.R.H. Cambridge Homes, Inc.*, 262 F. Supp. 2d 923, 927  
 25 (N.D. Ill. 2003) (denying request for revenue statements in copyright case and  
 26 finding that the defendant's profits were limited to its saved acquisition costs  
 27 which could be derived from expert testimony).

28                   ///

1 Penske's document requests go far beyond what could be relevant under any  
2 legally cognizable theory of actual damages pursuant to copyright law: *Id.* at 927-  
3 28 (noting possible theories of damage as being that (1) as a result of the  
4 infringement, plaintiff lost profits from the copyrighted work, *i.e.*, the market value  
5 of the work decreased; (2) but for the infringement, plaintiff might have been able  
6 to sell or license the work to defendant; and (3) as a result of the infringement,  
7 defendant earned profits that were not duplicative of plaintiff's lost profits); *see*  
8 *also* 4-14 *Nimmer on Copyright* § 14.02 (outlining cognizable theories of actual  
9 damages as (1) injury to market value of copyrighted work and (2) imputed license  
10 fee, including (3) the value of use to the infringer).

11 The revenues or profits associated with THR's entire website and homepage  
12 do not conceivably fit within any of these legal theories. It is worth restating what  
13 happened here: Penske's TVLine website had a standard Internet feature that  
14 caused images to rotate through a display window; for all of three weeks,  
15 Prometheus's THR had the same standard feature, using copied code rather than  
16 original code. Any linkage whatsoever between the use of the code and any  
17 revenues, profits or losses on either side of this dispute is far-fetched. Certainly  
18 there can be no basis for Penske's sweeping request for revenue data associated  
19 with the THR website or homepage as a whole.

20 As stated in Prometheus's prior response on this point (*see* Penske's Notice  
21 of Motion, at 33), Penske is a competitor trying to use this case as a pretext for  
22 digging into the economics of Prometheus's business. That business reality further  
23 supports denial of Penske's motion.

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1     **III. CONCLUSION**

2           For the foregoing reasons and those enumerated in the prior submissions,  
3 Prometheus respectfully requests that the Court grant its Motion to Compel and  
4 deny Penske's Motion to Compel.

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6     Dated: January 9, 2013

**SAUER & WAGNER LLP**

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8           By: /s/ Eve H. Wagner

9           Attorneys for Defendant

10           PROMETHEUS GLOBAL MEDIA, LLC

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